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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT G. KAUCKY,

Petitioner,

v.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit erred in precluding Petitioner-Plaintiff from pursuing his suit against Respondent-Defendant airline, where the airline's choice not to remit wrongfully collected monies owed to millions of air travellers conflicts with procedures set forth in the Internal Revenue Code and recommended by the Internal Revenue Service.
2. Whether the determination of the United States Court of Appeals for the Seventh Circuit, in refusing to hold exceptions exist to the procedures set forth in the Internal Revenue Code, results in the lack of a remedy which significantly impacts a large segment of the population.

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PETITION FOR WRIT OF CERTIORARI

Petitioner-Plaintiff ("Plaintiff") Robert G. Kaucky respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"), entered in this cause on March 20, 1997.

OPINIONS AND ORDERS BELOW

The denial by the Seventh Circuit of Plaintiff's petition for rehearing of the case is reprinted at page 22 of the appendix ("App."). *See also* 1997 U.S. App. LEXIS 7563 (7th Cir. Apr. 15, 1997).

The opinion and order of the Seventh Circuit affirming the dismissal of Plaintiff's case by the United States District Court for the Northern District of Illinois, Eastern Division ("District Court") is officially reported at 109 F.3d 349 (7th Cir. 1997) (Posner, R.A.) and reprinted at App. 1-9.

The minute order of the District Court denying Plaintiff's motion to alter or amend its judgment dismissing the case is reprinted at App. 10-11.

The memorandum opinion and order of the District Court dismissing Plaintiff's case for lack of jurisdiction is reprinted at App. 12-20. *See also* 1996 U.S. Dist. LEXIS 6750 (N.D. Ill. May 16, 1996).

The minute order of the District Court denying remand of Plaintiff's case to the Circuit Court of Cook County, Illinois, County Department, Chancery Division ("state court") is reprinted at App. 21.

JURISDICTION

Plaintiff brought this action in state court on January 24, 1996, alleging five causes of action under Illinois state law. On February 8, 1996, Respondent-Defendant Southwest Airlines Co. ("Defendant") removed Plaintiff's complaint on the basis that it presented a federal question under the Internal Revenue Code ("IRC"). On February 22, 1996, the District Court denied Plaintiff's motion to remand the case to state court. (App. 21).

On May 16, 1996, the District Court dismissed Plaintiff's complaint on the basis that it lacked jurisdiction to hear the case. (App. 12-20). On June 14, 1996, the District Court denied Plaintiff's motion to alter or amend its judgment of dismissal. (App. 10-11).

After Plaintiff appealed, the Seventh Circuit affirmed the District Court's order on March 20, 1997. (App. 1-9). On April 15, 1997, the Seventh Circuit denied Plaintiffs' petition for rehearing. (App. 22).

The jurisdiction of this Court to review the concerned judgment is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

26 U.S.C. § 4261
Imposition of tax

(a) In general.—There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person a tax equal to 10 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

. . .

(g) Termination.—The taxes imposed by this section shall apply with respect to transportation beginning after August 31, 1982, and before January 1, 1996.

26 U.S.C. § 4291
Cases where person receiving payment must collect tax

Except as otherwise provided in section 4263(a), every person receiving any payment for facilities or services on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment.

26 U.S.C. § 6415
Credits or refunds to persons who collected certain taxes

(a) Allowance of credits or refunds.—Credit or refund of any overpayment of tax imposed by section 4251, 4261, or 4271 may be allowed to the person who collected the tax and paid it to the Secretary if such person establishes, under such regulations as the Secretary may prescribe, that he has repaid the amount of such tax to the person from whom he collected it, or obtains the consent of such person to the allowance of such credit or refund.

(b) Credit on returns.—Any person entitled to a refund of tax imposed by section 4251, 4261, or 4271 paid, or collected and paid, to the Secretary by him may, instead of filing a claim for refund, take credit therefor against taxes imposed by such section due upon any subsequent return.

(c) Refund of overcollections.—In case any person required under section 4251, 4261, or 4271 to collect any tax shall make an overcollection of such tax, such person

shall, upon proper application, refund such overcollection to the person entitled thereto.

. . .

26 U.S.C. § 7421
Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

. . .

26 U.S.C. § 7422
Civil actions for refund

(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(b) Protest or duress.—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

. . .

(f) Limitation on right of action for refund.—

> (1) General rule.—A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. . . .

. . .

STATEMENT OF THE CASE

In 1995, airlines were required to collect a ten percent tax from travellers on transportation beginning and ending within the United States under 26 U.S.C. § 4261. The taxes imposed by § 4261 applied only to transportation beginning after August 31, 1982, and before January 1, 1996.

On December 6, 1995, President Clinton vetoed legislation that was to have extended the expiration date for collection of the federal excise tax under § 4261. Without an extension of the expiration date, collection of tax under § 4261 was only valid for travel through December 31, 1995. Although Congress had, in the past, extended the expiration date for § 4261 near the close of the Congressional session, such last minute passage of legislation was not expected before the close of the 1995 session. In fact, during that year, it became clear that the provision was not going to be extended. The media reported that Congress' failure to extend the expiration date of § 4261 would result in the loss of billions of dollars in revenue taken in by the Federal Aviation Administration used to run that agency.

On December 15, 1995, Plaintiff purchased round-trip tickets from Defendant for air travel in January 1996. At the time of purchase, Defendant charged Plaintiff ten

percent more than the fare on his tickets, purportedly as collection under the (expired) federal excise tax.

On January 22, 1996, after Plaintiff discovered that the federal excise tax applied only to travel through December 31, 1995 and realized that Defendant had wrongfully charged him a non-existent tax on his tickets, Plaintiff called Defendant's customer service department for remittance of his monies. Defendant refused Plaintiff's request for remittance of the improperly collected monies.

On January 24, 1996, Plaintiff filed a five-count complaint on behalf of himself and all others similarly situated against Defendant, on behalf of itself and all others similarly situated, in Illinois state court. Plaintiff filed the complaint in connection with Defendant's retention of and failure to remit the improperly collected monies to Plaintiff and the Class. The causes of action alleged in the complaint were 1) breach of contract; 2) reformation; 3) declaratory judgment; 4) statutory violation of 815 ILCS 205/2; and 5) conversion.

On February 8, 1996, Defendant removed the case to District Court on the basis of original jurisdiction under 28 U.S.C. § 1331. Defendant argued that it collected monies from Plaintiff under the mandate of § 4261, although a reading of the statute, on its face, revealed that collection of a tax from Plaintiff (who was travelling in 1996, outside the relevant dates of the statute), was not mandated under § 4261(g). Nevertheless, Defendant claimed that Plaintiff's complaint essentially sought the refund of a tax and accordingly, the complaint arose under the IRC. The District Court denied Plaintiff's motion to remand on February 22, 1996. (App. 21).

Thereafter, Defendant filed a motion to dismiss the case, claiming that Plaintiff had not followed the proper administrative procedures for claiming a tax refund as set forth in 26 U.S.C. § 7422. Defendant argued that Plaintiff was seeking a tax refund and under § 7422 actions for a refund may only be filed against the United States, and only after Plaintiff has first filed an administrative claim with the Secretary of Treasury. Defendant also argued that Plaintiff's claims were preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1) (now 49 U.S.C. § 41713) ("ADA"). Plaintiff argued that because Defendant improperly collected monies under the guise of a tax and could not have collected a tax where none exists, Plaintiff could not be requesting the refund of a tax and should be allowed to file suit directly against Defendant under an exception to § 7422. Plaintiff also argued that the ADA did not preempt his claims for breach of contract and conversion. On May 16, 1996, the District Court dismissed Plaintiff's complaint, holding that it lacked jurisdiction to hear the case because Plaintiff had not filed a claim for a refund with the Internal Revenue Service ("IRS") and because his only source of relief was against the United States. (App. 12). Plaintiff filed a motion to alter or amend the judgment of dismissal which the District Court denied on June 14, 1996. (App. 10).

On August 26, 1996, Plaintiff timely filed an appeal of the District Court's ruling with the Seventh Circuit. On March 20, 1997, the Seventh Circuit affirmed the District Court's ruling, determining that although the suit could not literally be construed as one for a refund of taxes, Defendant merely collected the monies in error and exercised colorable authority to collect a tax under the statute because it had every reason to believe that

the tax would be extended beyond the December 31, 1995 expiration date. (App. 1). The Seventh Circuit failed to even address the argument against ADA preemption. On April 15, 1997, the Seventh Circuit denied Plaintiff's petition for rehearing. (App. 22).[1]

REASONS FOR GRANTING THE WRIT

By affirming the District Court's dismissal of Plaintiff's case, the Seventh Circuit severely limited the public's access to any remedy, including remedies under common law, when monies are taken from citizens under the pretense of a non-existent tax. Not only does the amount taken or withheld from air travellers, estimated to be as much as 400 million dollars, represent harm of great magnitude, the far reaching consequences of leaving the existing opinion stand go way beyond that amount.

Although Plaintiff alleged that Defendant acted in bad faith by improperly collecting monies under a nonexistent tax, and by possibly retaining such monies collected under the guise of a tax, the District Court denied Plaintiff the opportunity to conduct any discovery on his allegation. While the District Court properly took the allegations of Defendant's bad faith conduct to be true, it nevertheless dismissed the allegation as unfair, merely because historically, the tax had been continually re-

---

[1] On April 28, 1997, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the U.S. District Court, Northern District of Texas, Dallas Division, in favor of Defendant in a similar case. *See Sigmon v. Southwest Airlines Co.*, No. 96-10720. A similar appeal is presently pending before the United States Court of Appeals for the Ninth Circuit. *See Brennan v. Southwest Airlines Co., et al.*, No. 96-17053.

newed. (App. 15). The District Court basically excused Defendant's conduct without having any proper basis to do so. The District Court assumed that historical reenactment of the legislation gave Defendant proper justification for its collection, without looking any further into Defendant's intent behind its actions. This flies in the face of the facts in the record, particularly in light of the fact that President Clinton had vetoed the legislation which was to have extended the tax and there was no time for Congressional action to extend the tax before the expiration date. The District Court should have determined on the basis of the present facts before it, and not facts in the preceding forty years, that Defendant should not have expected renewal of the act, and further discovery on Defendant's bad faith conduct was warranted. In doing otherwise, the lower courts have bifurcated accountability for bad faith conduct.

The Seventh Circuit clearly recognized that Plaintiff "was, it is true, denied an opportunity to conduct discovery aimed at finding out whether [Defendant] had been acting in bad faith." (App. 7). Yet, much as the District Court had, the Seventh Circuit dismissed the importance of looking further into the allegations of bad faith, raising assumptions with no factual support. The Seventh Circuit assumed that "it was a good bet" that the tax would not expire at the end of 1995 (App. 6) and stated that, at worst, the bad faith conduct claimed by Plaintiff "is that [Defendant] was overconfident in believing that the tax would be extended and as a result failed to take the prudent measures that the larger airlines took to refund the excise taxes that they collected." (App. 7-8). Plaintiff had claimed that Defendant collected monies under the statute, not because it was uncertain as to the applicability of the statute, nor because Defendant was

confused and made a mistaken reading of the statute. In actuality, Plaintiff claimed that Defendant clearly recognized the inapplicability of the statute to tax on travel after 1995, yet nevertheless chose to collect monies from travellers under the guise of a tax. Even if Defendant claims otherwise, the failure to grant Plaintiff the benefit of discovery improperly denied Plaintiff any opportunity to disprove Defendant's assertions. To do so with the assumption of bad faith rattles existing concepts of jurisprudence.

Where there is conflicting evidence before a court which necessitates discovery, such discovery should not be denied in the search for truth. In this instance, the Seventh Circuit was faced with conflicting evidence which should have led it to question the plausibility of Defendant's claims, and which potentially supported Plaintiff's claim of bad faith conduct on the part of Defendant. For instance, Defendant's affiant stated that the collected money had been turned over to the IRS. However, separate evidence showed that Defendant's director of public relations asserted that the monies were in fact being held in an escrow account. Evidence also shows the affiant contradicting her affidavit in her deposition testimony, by stating that the payment of monies to the IRS was not for the excise tax in question.

The Seventh Circuit further dismissed the need for discovery by claiming that it made no difference where the collected money was located, the reason given being that the principal is bound by the agent's act. The Seventh Circuit's rationale conflicts with a general principle of law. To hold the principal liable for monies remitted to it by its agent, such remittance must have been in good faith. *John L. Burns, Inc. v. Gulf Oil Corp.*, 208 F. Supp.

222, 223 (N.D. Ga. 1967) ("where money is paid to an agent as the result of a mistake, and the agent in turn paid the money in good faith to his principal, the correct remedy of the payor is in an action against the principal and not the agent"). Accordingly, the principal is not always bound by the agent's act. Evidence exists which points to the possibility that the improperly collected monies, if actually turned over to the IRS as claimed by Defendant, were turned over to the IRS after filing of the suit. Discovery would have aided in determining whether such remittance was made by Defendant in bad faith as an attempt to avoid responsibility for its wrongful collection of monies under the guise of a tax.

By failing to necessitate discovery, the Seventh Circuit effectively vitiates the vital role discovery plays in the judicial system. Both the District Court and the Seventh Circuit recognized that bad faith conduct existed on the part of Defendant, and discovery would have determined the scope of such bad faith conduct. By summarily dismissing Defendant's bad faith conduct, the Seventh Circuit has sanctioned acts which conflict with the IRC and IRS recommended procedures and has failed to address the possible exceptions to IRC procedures which arise when collection was made in the guise of a tax and when an implied cause of action is found.

I.

THE SEVENTH CIRCUIT'S DETERMINATION CONFLICTS WITH THE PROCEDURE SET FORTH IN THE INTERNAL REVENUE CODE AND RECOMMENDED BY THE INTERNAL REVENUE SERVICE.

By allowing Defendant to pass on the ramifications of its bad faith collection to the IRS to deal with, the

Seventh Circuit has allowed Defendant to act in conflict with the legislation which addresses situations such as this which involves millions of claims, and to act in conflict with the recommendations specifically set forth by the IRS to return the improperly collected monies to the consumer. The Seventh Circuit has caused the IRS to bear the administrative costs of returning the money rather than requiring such redress to be provided by the wrongful collector.

The evidence in the lower court proceedings revealed that the IRS urged the airlines to handle the situation themselves in making remittance of the monies to the consumers. The IRS stated that consumers to whom the tax did not apply were entitled to remittance of collections made by the airlines. It is believed that while the IRS stated that claims could be filed by individual consumers using Form 8849, the IRS had requested airlines to follow 26 U.S.C. § 6415 to remit the improperly collected monies to consumers. Under § 6415, carriers are allowed to directly remit monies to consumers from whom the carrier made a collection. The carriers are then entitled to claim a credit against subsequent returns to offset the amount of remittance to its customers. This procedure affords the IRS the opportunity to minimize confusion,[2] to minimize the number of claims filed by individuals, and to maximize reimbursement to individuals properly entitled to one.

Despite the IRS' reported position, Defendant claimed submitting a claim to the IRS was an adequate remedy.

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[2] The evidence showed that Form 8849 was not actually intended for such claims, although an exception was being made by the IRS in this instance.

To counter the evidence indicating that Form 8849 leads to an inadequate remedy for consumers, Defendant asserted that Form 8849 was not the proper form, that the District Court had identified Form 8849 to be used when the IRS has prescribed Form 843 as the proper form to use. In fact, the evidence submitted supports the claim that the IRS recommended Form 8849 to airlines as the form to be used. By focusing on evidence that indicates that the IRS itself is unclear when directing which form is the proper form to be used in filing a claim, Defendant only serves to point out the confusion the public is faced with when requesting that remittance be made of the improper collection. By returning the monies under § 6415, Defendant can easily prevent such confusion.

Regardless of which form the consumer uses to file a claim, the exhibits to the District Court pleadings point out that the average consumer will likely fail to be afforded any relief by filing an IRS form. The exhibits clearly indicate that the IRS has stated that original tickets be submitted in order for the IRS to honor the claim. However, in the majority of the cases, the original ticket stub has long ago been discarded or lost by travellers. Additionally, to get a copy of the ticket from airlines, consumers are generally charged a fee by the airlines, which basically negates any reimbursement they may eventually receive through filing a claim with the IRS.

The public has been denied an adequate remedy in that many, if not most, consumers are unaware that they are due a remittance of the monies collected from them. Those who are aware that they are owed money are unable to request remittance from the IRS, as shown *supra*. Requiring Defendant to follow § 6415 and directly

remit the improperly collected monies to consumers would reach the great majority of the population owed a return of their monies. Defendant has records on individuals from whom it improperly collected money; in an earlier hearing in the District Court, the attorneys for Defendant guaranteed the retention of all ticket copies. Individuals would not need to have retained their original ticket for remittance as Defendant already has the information in its records. In contrast, the IRS has no means of contacting those who travelled outside the scope of the statute and can only process each claim individually as they come in.

Requiring the IRS to process each claim individually generally offers no remedy to the claimant and is extremely costly. It is easier and more efficient for Defendant to process the claims altogether, and further, such remedy is intended by the tax laws. The court in *DuPont Glore Forgan Inc. v. American Tele. and Tele. Co.*, 428 F. Supp. 1297 (S.D. NY 1977), recognized that the purpose of § 6415 was:

> [T]o provide mechanisms for lessening the burden of administering a tax which is imposed on a large number of taxpayers paying a relatively small amount of tax on each taxable transaction. It eliminates the necessity of individual taxpayers filing refund claims for each overpayment of an excise tax by allowing refunds to be made to the collecting agent for all of its customers . . . and ensures that the ultimate economic benefit . . . is passed on to the taxpayer.

DuPont, 428 F. Supp. at 1304-1305. By requiring Defendant to remit the improperly collected monies to consumers under § 6415, the consumers are guaranteed a remedy and Defendant is ensured a credit from the IRS.

To hold otherwise results in the lack of a remedy to the vast majority of the consumers. While the Seventh Circuit recognized that following § 6415 was an appropriate way to proceed, it nevertheless found no fault in Defendant throwing responsibility to its customers to file a claim with the IRS for a return of the monies. By so holding, the Seventh Circuit failed to protect the public by failing to recognize the conflicts raised with the IRC and with the IRS, and the resultant lack of an appropriate remedy to the public.

II.

THE SEVENTH CIRCUIT'S FAILURE TO RECOGNIZE EXCEPTIONS TO PROCEDURES SET FORTH IN THE INTERNAL REVENUE CODE RESULTS IN A LACK OF REMEDY TO THE PUBLIC.

By not recognizing two exceptions to the IRC procedures, the Seventh Circuit leaves the court system with no means to police corporate entities such as Defendant from engaging in such manipulation of the tax system, the IRS is left with no assistance in properly remitting wrongfully collected funds to the public, and the majority of the air travelling public is left with no adequate access to the funds owed them. An exception to the limitation on bringing suit under § 7422 affords a proper remedy to the public, as does an implied cause of action under § 6415.

This Court has previously held that an exception exists to 26 U.S.C. § 7421, which prohibits suits for injunctions seeking to prevent the assessment and collection of a federal tax, the exception being when collection would be made under the guise of tax. If it can be shown that

"under the most liberal view of the law and the facts" that the collection is not valid, in such situations the collection is "merely in the 'guise of a tax'." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 8 L. Ed. 2d 292, 297, 82 S. Ct. 1125 (1962). As collection was attempted where no actual tax existed, this Court allowed the suit in *Enochs* to prevent such a collection to proceed, allowing an exception to the prohibition of § 7421.

A similar exception exists for § 7422, which limits suits for refunds. Plaintiff previously pointed out that Defendant had no applicable statute to support its collection of monies from Plaintiff and that applying the test from Enochs revealed that Defendant's collection was made in the "guise of a tax". The District Court determined that "[Plaintiff] says rightly that it cannot be established under the most liberal view of the land and the facts that Defendant's exaction was authorized by the Internal Revenue Code." (App. 16). Despite recognizing that Defendant's collection of monies was unauthorized, the District Court failed to find that collection was made under the guise of a tax and stated that there was no reason to grant an exception to § 7422. In support of its determination, the District Court looked at whether there was the possibility of an adequate remedy. The District Court stated that the difference lay between the availability of an adequate remedy in an action for an injunction and in an action for a refund.

The District Court felt that an exception to § 7421, allowing suit for an injunction, is necessary because an injunction is possible only when there is no adequate remedy at law to avoid a future or ongoing harm. (App. 16). The District Court determined that in a suit for a

refund of a tax, the harm is already complete and the IRC provides an adequate remedy at law to obtain a refund. (App. 16-17). Thus, the District Court felt that an exception to § 7422 was unnecessary. Yet under the District Court's rationale, an exception to § 7422 should be allowed to exist. Using the same logic, a suit for a refund should be possible only when there is no adequate remedy at law to avoid a future or ongoing harm. Such is the situation before this Court. The suit for an injunction in *Enochs* was allowed to proceed because collection was attempted under the guise of a tax. No valid tax existed for the collection. The District Court should have allowed the suit for a refund of the monies collected to proceed because the collection was made under the guise of a tax. No valid tax existed for the collection. Additionally, the District Court had no support for its conclusion that the public is afforded an adequate remedy under the IRC in this situation. As shown, *supra*, there is no adequate remedy at law for consumers to regain the improperly collected funds. The District Court's belief that filing Form 8849 leads to a simple resolution is unfounded and fails to distinguish between a theoretical remedy at law and an adequate remedy at law. (App. 18).

The Seventh Circuit failed to properly address the guise of a tax issue or apply the "most liberal view of the land and facts" test to Plaintiff's case. The importance of ensuring that customers are returned their money in situations where no valid tax was involved necessitates an exception to § 7422. This Court should allow an exception to § 7422, such as it previously allowed under § 7421, to protect the public interest. Defendant's collection was made under the guise of a tax, not under mandate of the IRC, and Plaintiff should not be required to

follow the requisites of § 7422, which are in place for valid tax matters.

In addition to the exception to § 7422 allowing a cause of action for refund of monies collected without a valid statute, an implied cause of action should have been found to exist under § 6415. This Court previously set forth a four-part test to assist in the determination of whether an implied cause of action exists. In *Cort v. Ash*, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 36, 95 S. Ct. 2080 (1975), this Court asked, 1) did the statute create a federal right in favor of the plaintiff; 2) was there legislative intent to create or deny such a remedy; 3) was it consistent with the underlying purposes of the legislative scheme to imply a private cause of action; and 4) is the cause of action traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

In applying the *Cort* test to Plaintiff's case, an implied cause of action may be found to exist under § 6415. Defendant is mandated by § 6415 to return its improper collection to the person(s) entitled thereto, and can thereafter apply for a credit from the IRS to offset its return of monies. Thus, the first prong of the test is met, § 6415 creates a federal right in favor of Plaintiff. Applying the second prong of the test also supports Plaintiff's argument for a private cause of action under § 6415. As discussed, *supra*, the court in *DuPont* recognized that the legislative intent behind § 6415 was to create a remedy, not deny one, in order to lessen the burden on the IRS and ensure that the ultimate economic benefit is passed on to the customers. The third prong of the test asks if

it is consistent with the underlying purposes of the legislative scheme to imply a private cause of action under § 6415. Not only was Defendant mandated by § 6415 to remit to its customers the improperly collected monies, Defendant had been urged by the IRS to follow the statute as well. Despite the language of the statute and the request of the IRS, Defendant chose to ignore its required role in returning the monies. Unless a private cause of action is allowed against Defendant to enforce it to meet its responsibility in remitting the improperly collected monies, the legislative scheme will not be met and millions of customers will be left with no remedy. Allowing a private cause of action is entirely consistent with the legislative scheme of lessening the burden on the IRS and ensuring that the ultimate economic benefit is properly passed on to the customers. Finally, the fourth prong of the *Cort* test also supports a finding of an implied cause of action under § 6415. This suit was removed from state court on the basis that it was basically a suit for a refund of taxes and that the IRC applied. It should be emphasized that Plaintiff continues to assert removal was improper because collection of monies was made in the guise of a tax, and simply the wrongful taking of money, and thus his suit is not one for refund of taxes. The Seventh Circuit appeared to agree with Plaintiff's stance in part, when it stated that "[i]n a literal sense this is not a suit for a refund of taxes." (App.3). However, in accordance with the determination that the IRC applies, should this Court agree that the IRC applies, questions involving the IRC are not traditionally relegated to state law and it is not an area basically the concern of the states. Accordingly, it is not

inappropriate to infer a cause of action based solely on federal law.

The Seventh Circuit concluded that an implied cause of action could not be found to exist under § 6415, without applying the *Cort* test. While the Seventh Circuit recognized that the provision was likely designed to spare individuals and the IRS the burden of preparing and processing relatively small claims, it nevertheless stated that "[w]hatever the provision's precise scope, there is no express authorization for suits by taxpayers to enforce it; no indication that Congress would have wanted the courts to entertain such suits despite the absence of express authorization" (App. 8). In failing to apply the *Cort* test to Plaintiff's suit, the Seventh Circuit comes to an improper conclusion resulting in an inadequate remedy to consumers.

CONCLUSION

The Seventh Circuit's holding creates potential conflicts with the IRC and the IRS which this Court needs to address. Additionally, by leaving consumers without a means of enforcing a remedy, the Seventh Circuit has negatively impacted the public at large. The Seventh Circuit erred in failing to properly address the issue of Defendant's bad faith, in failing to address the ramifications of Defendant's collection made in the guise of a tax, and failing to apply the *Cort* test. Hundreds of millions of dollars which were improperly extracted from consumers remain unreturned, without any real means of returning the money to the proper hands.

For the foregoing reasons, Petitioner-Plaintiff Robert G. Kaucky respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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